APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2820

BERRELL FREEMAN,
Plaintiff-Appellant,

v.

GERALD A. BERGE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 03-C-21-C—Barbara B. Crabb, Chief Judge.

ARGUED NOVEMBER 7, 2005—
DECIDED MARCH 23, 2006

Before POSNER, EASTERBROOK, and WOOD, Circuit Judges.

POSNER, *Circuit Judge*. A jury in this suit under 42 U.S.C. § 1983 (denial of federal right under color of state law) found that the defendants, officials at a Wisconsin prison, had inflicted cruel and unusual punishment on inmate Freeman by denying him meals. The jury awarded him $50,000 in compensatory damages, plus punitive damages, incomprehensible in light of the evidence, aggregating $1.2 million. The judge granted judgment as a matter of law for the defendants. Freeman appeals from that judgment, seeking reinstatement of the jury's verdict.

Freeman is serving a 58-year sentence in Wisconsin's maximum-security prison (nicknamed the "Supermax," *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006); see *Jones-El v. Berge*, 374 F.3d 541, 542-43 (7th Cir. 2004)) for a variety of violent crimes. Inmates in the Supermax are fed their three meals a day in their cells. The prison's feeding rule requires that the prisoner stand in the middle of his cell, with the lights on, when the meal is delivered and that he be wearing trousers or gym shorts. If the inmate does not comply with the rule, the meal is not served him. Freeman wanted to eat in his underwear, so on a number of occasions over a two-and-a-half-year period he refused to put on pants or gym shorts and as a result was not served, and because he skipped so many meals he lost 45 pounds. The prison also refused to serve him when he had a sock on his head (which could be used as a weapon, depending on what was in it), when his cell walls were smeared with blood and feces that he refused to clean, and when he was asleep.

His behavior was disgusting. But he argues that denial of food is a cruel and unusual punishment for the violation of a prison rule or norm. It is certainly an unusual form of punishment nowadays, and in cases in which it inflicts serious harm on the prisoner it is also cruel. *Reed v. McBride*, 178 F.3d 849, 853-54 (7th Cir. 1999); *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002); see *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Sanville v. McCaughtry*, 266 F.3d 724, 733-34 (7th Cir. 2001); *Talib v. Gilley*, 138 F.3d 211, 214 n. 3 (5th Cir. 1998). But there is a difference between using food deprivation as a punishment and establishing a reasonable condition to the receipt of food. Suppose that when a guard delivered a food tray to Freeman, Freeman hurled it at the guard. Freeman would have missed a meal but it would be a consequence not of punishment but of a reasonable condition of being fed—that you not throw back the food in the server's face. In such a case Freeman would

be the author of his deprivation rather than a victim of punishment. *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005).

The same is true here. The pants requirement may not seem a reasonable condition on receiving food but it is. In the words of the appellees' lawyer in his opening statement to the jury, "There are two primary reasons. Number one, there are a lot of women security officers working in this facility so they are entitled to basic privacy. Secondly, there are security issues. Inmates throw urine, feces, expose themselves, ejaculate, and to prevent that from happening to any security officer, there is a rule that the inmate must be clothed." The pants requirement, violation of which was the major cause of Freeman's missed meals, imposed a condition that he could readily have complied with; he offers no excuse for his noncompliance.

He missed some meals not because of the pants rule but because of the sock on the head, the blood and feces on the wall, or his being asleep. The refusal to serve him in the first of these cases, whether or not authorized or directed by any rule, cannot be thought unreasonable; the sock posed a potential threat to the guards. The possibility of contamination of the food by blood or feces might justify refusal to serve a meal in the second case, but this is not argued. Unless the guards had difficulty waking him or were fearful as to how he might react to being wakened, his being asleep at mealtime would not be a good reason for not feeding him. But Freeman failed to show how many of his missed meals were missed for reasons that cannot be easily related to the refusal to comply with a reasonable condition on the receipt of food, except that he testified that he received only one meal a day for two weeks because he refused to keep his cell clean (at the end of that time prison employees cleaned it). That deprivation by itself would not in the circumstances of this case rise to the level of cruel and unusual punishment.

The reason for distinguishing between food deprivation as a punishment and food deprivation as a consequence of a refusal to comply with a condition precedent to being fed is that if as Freeman argues any deprivation of food is an unconstitutional punishment, a food policy cannot be enforced, at least against prisoners in Freeman's situation. When we asked his lawyer what alternative response to her client's behavior would have been effective in getting Freeman to comply with the food policy, all she could think of was placing him in segregation (but he already is in segregation—that is why he is being served all his meals in his cell), denying him good-time credits, or depriving him of commissary and other privileges, such as a television set in his cell. Given the length of his sentence and what is plainly a propensity for obstreperous behavior, it is unlikely that a denial of good-time credits will inflict significant disutility on him; and as far as denial of privileges is concerned, he has been denied privileges, without the denial having deterred him from continuing to violate the food rule. The logic of his position is that if he refuses any meal that is not prepared by Charlie Trotter, the prison must procure his meals from Trotter's catering service and cast about for some method unrelated to food of discouraging him from making such demands. Freeman refuses to take seriously the practical limitations of prison discipline as a means of maintaining an orderly environment.

A better argument is that while alternative responses to Freeman's behavior may have seemed unpromising, food deprivation turned out not to be very effective either, for it took more than two years for the deprivation to be effective—and it is not clear that hunger or the health effects of loss of weight was what motivated Freeman to start eating again. But we are pointed to no alternatives that would have been more efficacious.

It does not follow from anything we have said, however, that a prison can allow a prisoner to starve himself to death,

or even starve himself to the point at which he seriously impairs his health, which could happen even if his ending weight was "normal" (imagine a person whose weight falls from 250 to 150 pounds in a couple of months). The prison cannot be forced by such tactics to change an otherwise reasonable rule, *Rodriguez v. Briley*, *supra*, 403 F.3d at 953; *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Talib v. Gilley*, *supra*, 138 F.3d at 216; *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984); *People ex rel. Illinois Dept. of Corrections v. Millard*, 782 N.E.2d 966, 972 (Ill. App. 2003), but at some point it may have to force-feed the prisoner to prevent him from seriously endangering his health.

Two situations can be distinguished. In the first, the prisoner is insane, and his insanity causes him to refuse food; the prison is constitutionally obligated to treat his mental illness, if necessary by force-feeding him. *Sanville v. McCaughtry*, 266 F.3d 724, 733-34 (7th Cir. 2001); *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001). In the second situation, the prisoner is perfectly sane, but he either wants to commit suicide (and there are rational suicides) or he is prepared to risk death from a hunger strike to make a political point. Free people who are sane have a liberty interest in refusing life-saving medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990); see *Washington v. Glucksberg*, 521 U.S. 702, 722 n. 17 (1997), and likewise in refusing to eat, *Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004); *Bouvia v. Superior* Court, 225 Cal. Rptr. 297, 300, 305 (App. 1986); see also *Washington v. Glucksberg*, *supra*, 521 U.S. at 723, a method by which some elderly people commit suicide. Ronald M. Holmes & Stephen T. Holmes, *Suicide: Theory, Practice, and Investigation* 59-60 (2005); Martin Tolchin, "When Long Life Is Too Much: Suicide Rises Among Elderly," *New York Times*, July 19, 1989, p. A1. But either prisoners don't have such an interest, or it is easily overridden. *In re Grand Jury Subpoena John Doe*, 150 F.3d 170, 172 (2d Cir. 1998) (per curiam); *Martinez*

v. Turner, 977 F.2d 421, 423 (8th Cir. 1992); *Laurie v. Senecal*, 666 A.2d 806, 809 (R.I. 1995); *In re Caulk*, *supra*, 480 A.2d at 96-97; *State ex rel. White v. Narick*, 292 S.E.2d 54, 58 (W. Va. 1982); *McNabb v. Department of Corrections*, 112 P.3d 592, 594-95 (Wash. App. 2005); *People ex rel. Dept. of Corrections v. Fort*, 815 N.E.2d 1246, 1250-51 (Ill. App. 2004); contra, *Zant v. Prevatte*, 286 S.E.2d 715, 716- 17 (Ga. 1982).

The reasons are practical. (No longer does one hear that prisoners must not be allowed to evade punishment by killing themselves and thus "cheating the gallows.") If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the prisoners. Prison officials who let prisoners starve themselves to death would also expose themselves to lawsuits by the prisoners' estates. Reckless indifference to the risk of a prisoner's committing suicide is a standard basis for a federal civil rights suit. E.g., *Boncher ex rel. Boncher v. Brown County*, 272 F.3d 484 (7th Cir. 2001). The idea behind liability in such cases is that incarceration can place a person under unusual psychological strain and the jail or prison under a commensurate duty to prevent the prisoner from giving way to the strain. The analysis is applicable when suicide takes the form of starving oneself to death. See *Laurie v. Senecal*, *supra*, 666 A.2d at 809; *Commonwealth of Pennsylvania, Dept. of Public Welfare v. Kallinger*, 580 A.2d 887, 893 (Commonwealth Ct. 1990).

So at some point in Freeman's meal-skipping the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment. Knowing this, the prison has a policy of requiring a prisoner who has skipped all his meals for three consecutive days to be inspected by employees of the prison's health service to make sure he isn't seriously endangering his health. Twice Freeman did not receive a timely inspection and as a result, on each occasion,

went eight days straight without a meal. But there is no indication that his life or health was jeopardized. He lost 45 pounds over 31 months, but since he weighed 195 pounds at the beginning and is only 5 foot 6 inches tall he ended up closer to the normal weight for a person of his height than when he began. Not that that is a complete defense, as we indicated earlier. Because of the irregularity of his eating, he experienced unpleasant symptoms, such as blurred vision. But there is no evidence that the defendants knew that he was endangering his health sufficiently to require drastic intervention. He was visited by nurses who confirmed that he was taking water and checked his appearance through the window of his cell, and he was visited by a doctor as well though at some point he began refusing to see the doctor. No doubt he would have sued the defendants for battery had they ordered him force-fed.

Because to an overwhelming degree Freeman's food deprivation was self-inflicted, even if not 100 percent of it was, and the record contains no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences, the judgment for the defendants must be, and it is,

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed May 19, 2005]

Case No. 03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; JON LITSCHER; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; JOHN SHARPE, Unit Manager (former) in his individual capacity; and BRAD HOMPE, Unit Manager, in his individual capacity,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with DISTRICT JUDGE BARBARA B. CRABB presiding. The issue have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion of defendants Gerald Berge, Peter Huibregtse and Brad Hompe for judgment as a matter of law is GRANTED and judgment entered December 30, 2004 is VACATED.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered DISMISSING this case as to all defendants.

Approved as to form this 18th day of May, 2005.

/s/ Barbara B. Crabb
BARBARA B. CRABB
DISTRICT JUDGE

/s/ Theresa M. Owens
Theresa M. Owens
Clerk of Court

May 19, 2005
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed May 17, 2005]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager, in his individual capacity,

Defendants.

OPINION AND ORDER

In a recent case, the Court of Appeals for the Seventh Circuit held that the denial of meals to a prisoner is not punishment within the meaning of the Eighth Amendment if the denials are a response to the prisoner's refusal to obey a valid institutional regulation. *Rodriguez v. Briley*, 403 F.3d 952, 952-53 (7th Cir. 2005) ("deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment"). *Rodriguez* bears directly on the case before the court, in which plaintiff Berrell Freeman sued prison officials Gerald Berge, Peter Huibregtse, Gary Boughton and Brad Hompe pursuant to 42 U.S.C. § 1983 for damages and injunctive relief. Plaintiff alleged that he had suffered injuries as a result of defendants' enforcement of an institution policy under which inmates who do not wear pants (shorts or trousers), stand in the middle of their cells and turn on their cell lights

before their meals are delivered are considered to have refused the meals. Plaintiff contended that defendants had violated his Eighth Amendment protection against cruel and unusual punishment by enforcing a prison policy that resulted in plaintiff's not receiving hundreds of meals over a three to four year period. In addition to the meal policy claim, plaintiff raised a number of other claims about the conditions in which he was held at the Wisconsin Secure Program Facility, all of which were dismissed in pretrial rulings.

At trial, plaintiff adduced evidence that he had been denied meals on hundreds of occasions over a period of about 27 months because he had refused to put shorts or pants over his underwear or turn on his light in accordance with the meal delivery policy, had worn a sock around his head, refused to clean his cell or slept through the announcement of the meal. He missed meals for three days in April 2001; he missed approximately 242 meals between July 6, 2001 and November 3, 2001; he missed all meals for two consecutive days in April 2002; he missed meals for at least eight consecutive days in June through early July 2002; he missed meals for several consecutive days in February 2003; he missed meals for three consecutive days in March 2003; he received only his breakfast meal each day from May 18 until June 5, 2003; he missed all meals for two periods in September 2003, one lasting two days and one lasting four; and he missed all meals for at least eight straight days during October 2003. Plaintiff testified that as a result of the missed meals, he lost weight, had headaches, constipation, trouble breathing and walking, suffered from depression and started hearing and seeing things.

At the end of the liability phase of the trial, the jury found that plaintiff had been subjected to a serious deprivation of his basic need for food while he was confined at the Secure Program Facility between April 23, 2001 and October 12, 2003 and that defendants Gerald Berge, Peter Huibregtse and Brad Hompe had acted or failed to act with deliberate indif-

ference or reckless disregard of the inhumane conditions of confinement complained of by plaintiff. The jury found no liability as to defendant Gary Boughton. In the damages phase, the jury found that plaintiff suffered physical injury from defendants' action or inaction. The jury was sufficiently concerned about plaintiff's treatment that it awarded him $50,000 in compensatory damages and $400,000 in punitive damages against each of the remaining defendants. Following the entry of judgment, defendants renewed their motion for judgment as a matter of law and moved in the alternative for a new trial or a remittitur of the compensatory damages in the amount of $25,000. Plaintiff filed a motion relating to attorney fees.

Shortly after the post-trial briefing was completed, the Court of Appeals for the Seventh Circuit decided *Rodriguez*, 403 F.3d 952. The rule at issue in *Rodriguez* was one that required inmates to store their belongings in a storage box before they left their cells; if they did not do so, they were not allowed to leave the cell, even for a shower or a meal. Rodriguez refused to put his belongings into his storage box with the result that he missed about 75 showers and between 300 and 350 meals and lost 90 pounds over the course of 18 months. The court of appeals held that he was never subjected to any "punishment"; rather, he punished himself. "As soon as Rodriguez puts his belongings in the storage box, he can leave his cell and go to the cafeteria. So, he was not punished, and we need not decide whether, or how many, skipped meals constitute a cruel and unusual punishment for violation of a valid prison regulation." *Id.* at 953. The court added that at some point, "refusal to eat might turn suicidal and then the prison would have to intervene. Likewise if noncompliance with the rule were a product of insanity." *Id.* (internal citations omitted).

Plaintiff suggests that his case is distinguishable from *Rodriguez* because Rodriguez never challenged the validity of

the rule requiring him to stow his belongings before leaving his cell and because the rule had a safety or security purpose. (It promoted fire safety, facilitated cell searches and "in other ways as well promote safety and security." *Id.* at 952.) Plaintiff points out that he was denied meals not only for failing to wear pants but on one occasion, for failing to clean the blood and feces he had smeared on the walls of his cell.

Nothing in the court of appeals' holding suggests that the court would view the rules at issue in this case as "invalid" for the purpose of determining whether plaintiff was subjected to punishment for refusing to follow them. The law gives prisons and their administrators wide latitude with respect to day-to-day operations. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The rules at issue in this case could be justified as designed to decrease incidents of sexual exhibitionism, safety (standing in mid-cell with the lights on protects the officers who are setting food trays on the trap, as does not being able to wear a sock around one's head to hide a potential weapon), health and cleanliness.

In *Rodriguez*, the court of appeals had no reason to decide whether an inmate might have an actionable Eighth Amendment claim if he could show that he had suffered serious harm that did not rise to the level of being "suicidal" or to any other "substantial risk of serious harm" because that issue was not present in the suit. The consequences of Rodriguez's refusal to obey the rule were limited to weight loss (which the court seemed to think was beneficial to him), fatigue and a rash. It is likely that the court would view a showing amounting to a substantial risk of serious harm as sufficient to change the calculus. Although prison officials may legally deny food to inmates who refuse to comply with institution rules, they cannot stand by and allow an inmate to bring upon himself a substantial risk of serious harm to his health or safety. *Farmer v. Brennan*, 511 U.S. 825 (1994). As I noted in the December 17, 2003 order in this case denying defen-

dants' motion for summary judgment, "It is one thing to acknowledge that prison officials have a legitimate interest in enforcing compliance with prison rules. It is quite another to conclude that there are no limitations on the enforcement of those rules so long as the prisoner always has a choice to comply." Dkt. #129 at 16. At some point, intervention is required to preserve the inmate's health and life.

In the December 17 order, defendants were denied summary judgment on the ground that a reasonable jury could find that plaintiff was subjected to a substantial risk of serious harm to his health when he was denied food as many as 242 times between July and November 2001. Defendants argued that the Eighth Amendment did not apply to a case of food deprivation when the inmate could have received the food if he had chosen to comply with the rule at issue. In response to this argument, I noted that it was true that no court had held that using food as a tool for behavior modification was a violation of the Eighth Amendment in all circumstances, although some courts had questioned the penological value of the practice. In plaintiff's case, however, the evidence that was undisputed for the purpose of summary judgment showed that he had been denied food repeatedly for periods lasting several days or longer. I rejected defendants' argument to the extent that they argued that there were no limitations on the enforcement of compliance with prison rules so long as the prisoner always has the choice of complying. Such an approach seemed inconsistent with the case law holding that prison officials may be liable if they are shown to have been deliberately indifferent to an inmate's risk of harming himself in a suicide attempt, even though the immediate cause of the injury is the inmate's own actions. In my view, the question was whether the inmate's nutrition is sufficient to maintain his health; if it was not, an Eighth Amendment violation could be made out even if the defendants had denied the inmate food for violations of rules and not because of malice or neglect. *Williams v. Greifinger*, 97 F.3d 699, 705 (2d Cir.

1996) (even when inmate holds "'the key to his cell,' in the sense that by agreeing to comply with prison rules he could have achieved release from segregation; . . . that fact in no way relaxe[s] the court's inquiry into the adequacy of the conditions to which [inmate] was subjected"); see also *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078, 1083 (5th Cir. 1991) (holding that prisoner stated cause of action when he alleged that prison officials had withheld food from him for long periods of time because he refused to follow dress regulations for meals; "facially permissible form of punishment may, for example, through continual use inflict cruel and unusual punishment").

Rodriguez, 403 F.3d 952, does not undermine the view that at some point, the denial of food to an inmate may violate the Eighth Amendment even if the denial is the result of the inmate's own choice not to follow the rules. To do so, however, the denial must result in the substantial risk of serious harm. It is only extreme deprivations that make out an Eighth Amendment claim. *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992) (holding that only "those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment claim").

In the course of ruling on the parties' motions prior to trial, I understood plaintiff to be raising an "as applied" challenge to defendants' policy. For example, in the order denying defendants' motion for qualified immunity, I stated, "I do not understand [plaintiff's] second amended complaint to present a facial challenge to the [meal] policy. Rather, as I read the complaint, [plaintiff] is alleging that defendants' implementation of the policy is unconstitutional because its enforcement has resulted in the denial of hundreds of meals on at least a semi-regular basis over several years and for more than a week at a time on two occasions." Nov. 10, 2004 Op. & Order, dkt. # 181, at 10. At trial, however, plaintiff based his case on a facial challenge to the policy of using food to

coerce behavior. His counsel began her opening statement by saying

> This case is about whether the Wisconsin Prison System can withhold the food from prison inmates as a punishment for not following prison rules or whether that practice violates the United States Constitution.

In light of the decision in *Rodriguez*, it is clear that this facial challenge to the policy is untenable. However, the outcome would have been the same even if he had continued to challenge the policy as it was applied to him because he was unable to show that he had been subjected to a substantial risk of serious harm. He adduced no evidence that before October 2003, he had ever been denied more than nine meals in succession, so as to trigger the institution's policy of bringing in a doctor and nurse to assess an inmate's health status and he admitted that nurses started visiting him in October, which is when he missed nine consecutive meals. He testified that he continued to drink water even when he missed meals and that he saw nurses during the periods when he was not receiving every meal. His own expert witness testified that plaintiff's lack of food could have caused him headaches, dizziness, muscle weakness, inability to stand for long periods of time and difficulty breathing and talking but she did not identify these particular consequences as serious physical harm. She testified also that so long as plaintiff was drinking water, he could go without food for several weeks before experiencing organ failure. She did note one study in which 36 healthy men in the military were given only half of their caloric requirements for a six-month period and that two or three of the men had become psychotic at the end of the study. In addition, she testified that starvation, or organ failure, would be the end of a continuum of physical harm that individuals suffer as a result of lack of food. She agreed that nothing in plaintiff's medical records showed that he had come anywhere near the point of organ failure and that she

would not expect to see a significant health risk where an individual goes three days without eating but continues to drink liquids. Also, she noted that the institution records showed that on several occasions a Dr. Maier had ordered a high caloric, high protein diet for plaintiff when he was losing weight and that the diet orders were carried out.

One of the institution nurses testified that when plaintiff did miss more than nine consecutive meals in October 2003, the institution initiated its hunger strike protocol, under which nurses began monitoring plaintiff, giving him information about the risks of not eating and assessing his vital signs. Had plaintiff continued to refuse to follow the meal service policy, the nurses would have had a doctor see him and they could have taken additional steps to assess his condition, such as weighing him and drawing blood for analysis.

Defendant Hompe testified that institution policy requires staff to generate an incident report when an inmate misses nine consecutive meals and give notice to the health services unit, clinical services, the unit manager and the security director. At that point, the health services unit places the inmate on hunger strike protocol for monitoring and both the sergeant and the unit manager talk to the inmate to try to find out why he is refusing meals. A multidisciplinary meeting is held to discuss the inmate and others with special needs to make sure that the inmate is being monitored and the doctor is assessing him. In extreme conditions, the institution will notify lawyers and obtain a court order for forced feeding or hydration.

The trial evidence falls short of establishing that plaintiff's course of conduct and defendants' response subjected plaintiff to a substantial risk of serious harm. There was no evidence that any of his physical problems amounted to serious harm; he missed more than nine consecutive meals on only one occasion, in October 2003, and he continued to drink water when he was missing meals. He never reached the point of organ failure or came close to it. There was no evidence

that he became psychotic or suffered any other serious mental reaction from his lack of food. Therefore, the jury's finding of liability cannot be sustained. Because plaintiff did not prove he was at risk, he did not prove the first of the two prongs that are necessary to establish an Eighth Amendment claim: a substantial risk of serious harm. Without a showing of a substantial risk, he has no basis on which to argue the second prong: that defendants were deliberately indifferent or acted in reckless indifference to the risk. Plaintiffs' failure to prove the facts necessary to sustain his Eighth Amendment claim moots the issue of defendants' entitlement to qualified immunity and plaintiff's motion relating to attorney fees.

Although the verdict cannot be upheld in light of the court of appeals' decision in *Rodriguez*, 403 F.3d 952, and plaintiff's failure to show that the cumulative effect of the meals he missed put him at substantial risk of serious harm, it would be unfortunate if the Department of Corrections disregarded the expression of public opinion that the jury's verdict represents. It is evident that the jury found the institution's policy of using food to coerce behavior to be inhumane in an institution in which all inmates are deprived of most forms of sensory stimulation and many lack the mental or emotional wherewithal to make intelligent decisions. ORDER IT IS ORDERED that the motion of defendants Gerald Berge, Peter Huibregtse and Brad Hompe for judgment as a matter of law is GRANTED; the judgment entered herein on December 30, 2004 is VACATED and the clerk of court is directed to enter judgment for all defendants in all respects. FURTHER, IT IS ORDERED that plaintiff Berreli Freeman's motion relating to attorney fees is DENIED as moot.

Entered this 16th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed Dec. 1, 2004]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager (former), in his individual capacity,

Defendants.

SPECIAL VERDICT LIABILITY

We, the jury, for our special verdict, do find as follows:

Question No. 1: Was plaintiff Berrell Freeman subjected to a serious deprivation of his basic need for food while he was confined at the Wisconsin Secure Program Facility between April 23, 2001 and October 12, 2003?

Answer: Yes

(Yes or No)

If you answered "Yes" to Question 1, proceed to Question 2. If you answered "No" to Question 1, proceed no further.

Question No. 2: Did any one or more of the defendants act or fail to act with deliberate indifference or reckless disre-

gard of the inhumane conditions of confinement complained of by plaintiff Freeman?

Answer:

Gerald A. Berge Yes
(Yes or No)

Peter Huibregtse Yes
(Yes or No)

Gary Boughton No
(Yes or No)

Brad Hompe Yes
(Yes or No)

/s/ Vicki McHone
Presiding Juror

Madison, Wisconsin

Dated this 1 day of December, 2004.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed Dec. 1, 2004]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager (former), in his individual capacity,

Defendants.

SPECIAL VERDICT DAMAGES

We, the jury, for our special verdict, do find as follows:

Question No. 1: Did plaintiff Berrell Freeman suffer any physical injury from the action or inaction of any one or more of the defendants?

Answer: Yes

(Yes or No)

If you answered "Yes" to Question 1, proceed to Question 2. If you answered "No" to Question 1, proceed to Question 3.

Question No. 2: What sum of money, if any, would fairly and reasonably compensate the plaintiff Berrell Freeman for his injuries?

Answer: $ 50,000

Answer Question 3 only if you answered "yes" to Question No. 1.

Question No. 3: For those defendants that you found were aware of and deliberately indifferent to the inhumane conditions of confinement complained of by plaintiff Berrell Freeman, what sum of money, if any, should be awarded to plaintiff in order to punish the defendants for their conduct and to deter the defendants from engaging in similar conduct in the future?

Answer:

Gerald A. Berge $ 400,000

Peter Huibregtse $ 400,000

Brad Hompe $ 400,000

/s/ Vicki McHone
Presiding Juror

Madison, Wisconsin

Dated this 1 day of December, 2004.

APPENDIX F

JURY INSTRUCTIONS

[Filed Dec. 1, 2004]

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of two questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

The Eighth Amendment to the United States Constitution provides that no cruel and unusual punishment may be inflicted. Plaintiff Berrell Freeman is an inmate at the Wisconsin Secure Program Facility. Plaintiff Freeman claims that the defendants denied him his Eighth Amendment rights by implementing a policy that resulted in Mr. Freeman's being denied meals between April 23, 2001 and October 12, 2003. The defendants deny that they deprived plaintiff Freeman of his rights under the Eighth Amendment.

The problems that arise in the day-to-day operation of a correctional facility are not susceptible to easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. However, the Eighth Amendment imposes the duty on prison officials to provide humane conditions of confinement. Prison officials must ensure that inmates receive nutritionally adequate food, clothing, shelter and medical care.

Question number 1 asks whether plaintiff Freeman was subjected to a serious deprivation of his basic need for food while he was confined at the Wisconsin Secure Program Facility between April 23, 2001 and October 12, 2003. It is not enough that the conditions plaintiff Freeman complains of were restrictive or even harsh; this is part of the penalty that criminal offenders must pay. To answer the question "Yes," you must find that plaintiff was deprived of one of the minimal civilized measure of life's necessities. The test is an objective one. In applying it, you should be guided by society's contemporary standards of decency.

Question number 2 asks whether the defendants acted or failed to act with deliberate indifference or reckless disregard of the conditions of confinement complained of by plaintiff Freeman. To answer "Yes" as to any defendant, you must find that the defendant was personally responsible for the

deprivation of nutritionally adequate food, resulting is a substantial risk of harm to plaintiff. The personal responsibility requirement is satisfied if the conduct causing the deprivation occurred at the defendant's direction or with the defendant's knowledge and consent. That is, he must have known about the conduct and facilitated it, approved it, condoned it, or turned a blind eye. The personal involvement requirement may also be satisfied by those responsible for creating policies, practices and customs that caused the deprivation.

Deliberate indifference is established only if there is actual knowledge that plaintiff Freeman was not receiving nutritionally adequate food and if the defendants disregarded that fact by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference. To act "deliberately" means to act intentionally; that is, knowingly and voluntarily and not because of mistake or accident.

Acts are reckless when they represent a gross departure from ordinary care in a situation where a high degree of danger is apparent. If any one of the defendants was in a position in which he certainly should have known that his conduct would violate plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then he acted with reckless disregard for the plaintiff's rights.

You have heard evidence that certain witnesses have been convicted of crimes. Evidence of a witness's prior conviction of a crime may be considered by you only insofar as it may affect the credibility of the witness. You may use that evidence only to help you decide whether to believe that witness and how much weight to give that witness's testimony.

The burden of proof rests upon the party contending that the answer to a question should be "Yes." This burden is to satisfy you, to a reasonable certainty, by the preponderance or

greater weight of the credible evidence, that "Yes" should be the answer.

By the preponderance of the evidence is meant evidence which when weighed against that opposed to it has more convincing power. Credible evidence is evidence that is worthy of belief in the light of reason and common sense.

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration.

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room. Once you are there, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree. When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the court.